

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs

2001

1st OK Corporation v. Morris H. Curtis and Sadie P. Curtis and Utah Title and Abstract Co. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John H Allen; Callister, Greene & Nebeker; Attorney for Appellant.

Tex R Olsen; Olsen and Chamberlain; Attorney for Respondent.

Recommended Citation

Brief of Respondent, *1st OK Corporation v. Curtis*, No. 14334.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/1416

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

RECEIVED
LAW LIBRARY

IN THE SUPREME COURT OF THE STATE OF ~~SEPT~~ 6 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

1ST OK CORPORATION, a Utah)
corporation, :

Plaintiff and Appellant,)

vs.)

MORRIS H. CURTIS and SADIE)
P. CURTIS, his wife; and UTAH)
TITLE & ABSTRACT CO., a Utah)
corporation,)

Defendants and Respondents.)

CASE NO. 14334

BRIEF OF RESPONDENTS

MORRIS H. CURTIS and SADIE P. CURTIS

APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL
DISTRICT COURT OF SEVIER COUNTY, DON V. TIBBS,
DISTRICT JUDGE, PRESIDING

TEX R. OLSEN
Olsen and Chamberlain
76 South Main
Richfield, Utah 84701

*Attorneys for Defendants-
Respondents*

JOHN H. ALLEN
Callister, Greene & Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133

*Attorneys for Plaintiff-
Appellant*

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE KIND OF CASE	1
II. DISPOSITION OF THE LOWER COURT	1
III. RELIEF SOUGHT ON APPEAL	2
IV. STATEMENT OF FACTS	2
V. ARGUMENT	11
POINT I. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE ISSUE OF CONFIDENTIAL RELATIONSHIP	11
1. THE ISSUE WAS RAISED BY THE PLEADINGS	11
2. THE EVIDENCE INTRODUCED DURING TRIAL REQUIRED THE INSTRUCTIONS TO BE GIVEN	17
POINT II. DEFENDANTS CURTIS DID ALLEGE AND DID PROVE THE ELEMENTS OF ACTIONABLE FRAUD	20
VI. CONCLUSION	23

CASES CITED

Burr vs. Child, 1 Utah 2d 199, 265 P.2d 383	11
Hickman vs. Taylor, 329 U.S. 495, 67 S.Ct. 385, 388, 91 L.Ed 451	11
In Re Swan's Estate, 4 Utah 2d 277, 293 P.2d 682	18, 19
Johnson vs. Johnson, 9 Utah 2d 40, 337 P.2d 420	19
Omega Investment Co. vs. Woolley, 72 U. 474, 271 P. 797	19
Pace vs. Parrish, 122 U. 141, 247 P.2d 273	20
Wilson vs. Oldroyd, 1 Utah 2d 362, 267 P.2d 759	12

AUTHORITIES CITED

American Jurisprudence 2d. § 3 pleading in Volume 61 Am Jur 2d. on page 460	12
Omega Investment Co. vs. Woolley, 72 Utah 474, 271 P. 797, quoting 2 Pomeroy, Equity Jurisprudence, Sec. 956	19

STATUTES AND RULES CITED

Utah Rules of Civil Procedure, Rule 3(a)	11
----------------------------------------------------	----

IN THE SUPREME COURT OF THE STATE OF UTAH

1ST OK CORPORATION, a Utah)	
corporation,	:	
)	RESPONDENT'S BRIEF
Plaintiff and Appellant,	:	
)	
vs.	:	
)	No. 14334
MORRIS H. CURTIS and SADIE	:	
P. CURTIS, his wife; and UTAH)	
TITLE & ABSTRACT CO., a Utah	:	
corporation,)	
	:	
Defendants and Respondents.)	

STATEMENT OF THE KIND OF CASE

The Plaintiff brought an action to specifically enforce the terms of a Uniform Real Estate Contract. Defendants Curtis counterclaimed, asking that the contract be rescinded because of the fraudulent representations and the fraud practiced upon them by the President of the Plaintiff Corporation. Defendant Utah Title and Abstract Company agreed to be bound by the order of the Court regardless of the outcome respecting the other parties and no other affirmative relief was asked against it.

DISPOSITION OF THE LOWER COURT

The case was tried to a jury. The jury entered a general verdict and special interrogatories in favor of the Defendants Curtis and thereafter Findings of Fact, Conclusions of Law and Judgment was entered by the Court in favor of Defendants Curtis.

RELIEF SOUGHT ON APPEAL

Defendants Curtis seek to have affirmed the verdict of the jury and the judgment of the lower court.

STATEMENT OF FACTS

We do not disagree with the summary statement of facts of appellant. However, we believe the facts must be supplemented to give the Court a basic understanding of the matter.

BUSINESS EXPERIENCE AND BACKGROUND OF DEFENDANTS CURTIS

Defendant Morris H. Curtis was a farmer (TR335) who supplemented his income as a delivery truck driver for Premium Oil Company (TR336). He had very limited business experience and had never had the services of a lawyer (TR336). He had never had a real estate transaction where he was the seller (TR336). When he purchased his farm property, the transaction was handled by a Sevier County Abstractor whom he thought to be the Sevier County Recorder (TR337). He was never acquainted with any real estate broker (TR337). He does not know how to read real estate descriptions or how to compute acreage (TR343).

Sadie P. Curtis, wife of the Defendant Morris H. Curtis, had little formal education. She finished the ninth grade and then was forced to leave school because of critical injury. She was in a coma for a period of

six months and then was blind and paralyzed for two years (TR413). She had no business experience. When she and her husband acquired a lot for the purpose of building their home, they exchanged a house trailer for it and the seller, her husband's uncle, took care of the property transfer (TR414). The farm purchase was handled by a Richfield Abstracter (TR414). She didn't know any lawyers or any real estate brokers (TR414). Mrs. Curtis has health problems which place severe limitations on her ability to transact business. She has a heart problem and high blood pressure. Tension or pressure or excitement cause a complete loss of memory. In her words, "I just don't remember. I just blank." (TR415).

NEED FOR ASSISTANCE AND PRELIMINARY INDUCEMENTS BY BUYER

The Curtises own 250 acres of land in Salina Canyon which was bisected by Interstate Highway I70 and upon which the Salina Freeway Exchange is now built (TR337). Prior to roadway construction, the Curtises were aware of the freeway activity and had seen surveyors on their property (TR338). They were aware of many problems in developing freeway frontage and knew they were not able to cope with them without assistance. The Curtises knew that they "were going to have to have some help to disburse of our property" (TR338). They knew their property was valuable but had no idea as to the extent

of its value (TR338). Orland Fiandaca, President of the Plaintiff 1st Ok Corporation, first contacted the Curtises in December of 1971 or early January 1972. The exact time is in some dispute. He spent over five hours (TR334) telling the Curtises of the problems in highway development and of his experience and ability to develop highway property (TR431). He said his services would make them financially independent. Curtises would be able to get a condominium in Hawaii and wouldn't have to work the rest of their lives (TR391 and TR417). Fiandaca informed Curtises that he was well acquainted with the Governor of the State of Utah and the State Road Engineer and was in close contact with them and could get whatever easements were needed to develop all of the Curtis property (TR342). It was at this time Curtises decided, "This is our man, a man who could help us with the disbursing of our property" (TR341).

Fiandaca presented to Curtises an arrangement by which Curtises agreed to grant to 1st Ok Corporation an option for \$100.00 which would allow 1st Ok Corporation to acquire 50 acres of land for \$1,000.00 per acre. The option was on the express condition that Fiandaca would represent Curtises and develop their remaining property so that it could be sold (TR391). Curtises would not have sold the land for the price

mentioned without the additional consideration (TR341).

ORIGINAL CONTRACT PREPARED BY BUYER

Fiandaca then wrote the option agreement in his own hand which tied up 50 acres of property for a period of one year for \$100.00 consideration. Mr. Curtis suggested going to a lawyer, but Fiandaca told him he had bad experience with lawyers and that he was capable of drawing up a contract. Fiandaca also informed Curtises that he had a title and trust company that would handle the matter for them (TR342 and 343). Mr. and Mrs. Curtis understood the title company "would be protectors" (TR343).

SECOND CONTRACT PREPARED BY BUYER

After the initial option prepared by Fiandaca was executed in December of 1971 or early January, 1972, Mr. Fiandaca came back to the Curtises on or about January 21, 1972 and informed them that the State Highway was going to condemn approximately 38 acres of land he had under option. Fiandaca informed them that this left him only about 12 acres to develop and that he wasn't in a position to represent them in developing their property unless additional land was added to his contract for his benefit. Curtises then agreed to add an additional 20 acres to the option agreement (TR345). A discussion was had concerning the

purchase price (TR391). It was agreed that the price would be \$65,000.00 for the original 50 acres plus 20 acres or a total of 70 acres. However, Fiandaca wrote the new contract to include 90 acres rather than 70 acres (TR224, 345, 346, 354, 368, 419 and 421). Because of the dependency the Curtises had on Fiandaca for services he was going to render, the Curtises agreed to a price of \$65,000.00 for the 70 acres (TR346 and 347). Fiandaca then wrote the option contract and the real estate description (TR346 and 352; Exhibit 41).

ADDENDUM TO SECOND CONTRACT

At a later date Fiandaca contacted the Curtises and said he had heard that they were not satisfied with the \$65,000.00 purchase price. The Curtises informed him that they were not satisfied because they felt they should have \$1,000.00 per acre for the land in the option agreement. Thereafter, the option contract was amended by an addendum to include an additional \$5,000.00 for a total purchase price of \$70,000.00 (TR352 and 353). Curtises were never aware of the fact that the contract (Exhibit 41) included 90 acres of their land until the time of pre-trial (TR367 and 368). The Curtises would not have signed the agreement if they had known 90 acres of their land was described (TR368). After the second preliminary

contract of January 21, 1972 (Exhibit 41) was prepared by Fiandaca in his own hand, it was signed by all of the parties. Thereafter Fiandaca exercised his option and a uniform real estate contract and trust agreement were completed (Exhibits 41a and 42) and the Curtises conveyed their property to Utah Title and Abstract Company on January 3, 1973 (TR359 and 360). The Curtises were paid the down payment less the \$100.00 option consideration which was returned to Fiandaca as a credit on the payment (Exhibit 43).

MANAGEMENT OF PROPERTY RETAINED BY SELLERS

After receiving the down payment on the property, the Curtises had frequent contact with Fiandaca in which he kept them informed on what he was doing to "manage" their property (TR347). Mr. Fiandaca's next payment under the contract was due January 3, 1973. Fiandaca contacted the Curtises and requested an extension of time for payment. The Curtises refused to grant the extension since they were negotiating to buy other grazing property for their cattle (TR362 and 363). The payment was not made. The Curtises waited thirty (30) days and then contacted an attorney for the first time. A notice of default was given pursuant to the terms of the Uniform Real Estate Contract and no

payment was made within the grace period (TR363, 364 and 365). After notice of default and demand for reconveyance (Exhibit 80) was given to Fiandaca and the Utah Title and Abstract Company, the Utah Title and Abstract Company refused to reconvey to the Curtises but at the request of Fiandaca conveyed all of the Curtis road frontage property to 1st Ok Corporation without prior notice to Curtises (TR312, 313 and 314).

FACTS DISCOVERED BY DEFENDANTS CURTIS AFTER DEFAULT
IN FIRST SCHEDULED PAYMENT

Thereafter, the Curtises learned the following facts which were never previously disclosed:

(a) Orland Fiandaca had not described 70 acres of their property in the option contract which he had prepared (Exhibit 41), but had inserted a description for 90 acres (TR224, 345, 346, 354, 368, 419 and 421).

(b) Orland Fiandaca had secured the release of a tract of the Curtis land on December 15, 1972 and prior to execution of the uniform real estate agreement and had sold the property for approximately \$20,000.00. Only \$10,000.00 of which was delivered to the Curtises as the down payment (TR360).

(c) The release of that initial tract of land landlocked property owned by Curtises to the South (TR361).

(d) Fiandaca had taken out personal bankruptcy which bankruptcy proceedings were closed in October, 1971 (TR254) a few months prior to negotiations and entering into the option agreement with Curtises (TR194).

(e) Orland Fiandaca had previously operated a corporation known as the Container Corporation which had become bankrupt (TR193).

(f) The 1st Ok Corporation was organized and the only contribution to capital was \$1,000.00 and a part of the \$1,000.00 was used for organization expenses (TR200).

(g) The 1st Ok Corporation had lost its charter for failure to file reports and returns required by the State of Utah (TR190, Exhibit 84).

(h) Fiandaca did not properly represent the Curtises in negotiations with the Utah State Road Commission or with other agencies and did not reserve private easements which could be used to service the remaining property retained by Curtises; specifically:

(1) Fiandaca obtained from the State Road Commission access openings of 50 feet for property acquired by him under the purchase agreement. The accesses granted to Curtises for other property owned by them and fronting on the access road were only 16 feet in width (TR349).

(2) Curtises' property remained zoned agricultural while Fiandaca procured a zone change for his property to highway commercial (TR361 and 148).

(3) Under the lot release provisions in the Fiandaca contract a selection was made of the entire land which fronted on the highway and landlocked the balance of the property owned by Curtises. See Exhibit 88 (TR222).

(4) Fiandaca borrowed funds for his own benefit on the Curtis property and executed two mortgages on Curtis land (TR233 and 368).

(5) Fiandaca sold options on parcels of the property being acquired from Curtises and did receive cash option consideration in excess of \$6,000.00 while he made no attempt to assist with sales or marketing of the remaining Curtis property (TR369 and 370).

(6) Fiandaca had negotiated with the Utah State Road Commission and secured a payment of \$500.00 per acre on the land in which he had an interest and identical land which was retained by the Curtises was condemned and the Curtises were paid \$200.00 per acre (TR350 and 351).

Upon learning the true facts, the Curtises counterclaimed against the 1st Ok Corporation to rescind the contract because of the fraud practiced

upon them by Orland Fiandaca, President of the buyer company.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE ISSUE OF CONFIDENTIAL RELATIONSHIP:

1. THE ISSUE WAS RAISED BY THE PLEADINGS.
2. THE EVIDENCE INTRODUCED DURING TRIAL REQUIRED THE INSTRUCTIONS TO BE GIVEN.
1. THE ISSUE OF CONFIDENTIAL RELATIONSHIP WAS RAISED BY THE PLEADINGS.

Rule 8(a) of the Utah Rules of Civil Procedure states the requirement for pleading as follows:

"(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled."

The foregoing rule has been reviewed by this Court on several occasions. In *Burr vs. Child*, 1 Utah 2d 199, 265 P. 2d 383 the Court wrote:

"Under the Utah Rules of Civil Procedure, for the most part taken from the Federal Rules of Civil Procedure, (28 USCA) a pleader is required only to make a short and plain statement of his claim, U.R.C.P. Rule 8(a), and the requirement of technical exactness is excluded. Fine detail is not required. *Porter v. Shoemaker*, D.C., p. 51. In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 388, 91 L.Ed. 451, Mr. Justice Murphy, discussing the Federal rules, said:

"The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial."

This court also considered pleading requirements in the case of *Wilson vs. Oldroyd*, 1 Utah 2d 362, 267 P.2d 759. At issue was the question of whether malice had been alleged in connection with the request for punitive damage. Justice Crockett wrote for the Court:

"Particularly under our new Rules of Civil Procedure (Rule 8A U.R.C.P.) a statement of ultimate fact is sufficient and it is unnecessary to set forth in detail the conduct, the language or the artifices used to accomplish the result."

The legal term "confidential relationship" or "trust" or "fiduciary" or "trustee" or "constructive trustee" are all words describing a legal conclusion or a legal relationship which result from a certain state of facts and from which certain legal rights and obligations result. This matter is covered in *American Jurisprudence* 2d. § 8 pleading in Volume 61 Am Jur 2d. on page 460, with the following statement:

"It is unnecessary to plead presumptions of law, inferences, or facts necessarily implied from other facts stated. A pleading which avers facts from which the law presumes another fact sufficiently pleads that other fact. What is clearly implied is as much a part of the pleading as what is expressed. Like a presumption of law, an inference need not be pleaded."

Defendants Curtis in paragraph four of their counter-claim stated:

"That the 1st Ok Corporation, a Utah Corporation, by and through its President, Orland Fiandaca, falsely made the following representations to induce Defendants to enter into said contracts and the Defendants reasonably relying thereon did enter into said contract, which misrepresentations were:

(a) Orland Fiandaca, President of the 1st Ok Corporation did represent that his company was a corporation under the laws of the State of Utah and was therefore a good buyer, financially sound and able to guarantee all of the performances and payments due under the Uniform Real Estate Contract dated the 15th day of December, 1972.

The 1st Ok Corporation has no assets with which to guarantee payment or performance of the Uniform Real Estate Contract identified and as a matter of fact has made sales of parcels of Plaintiff's property in advance for the purpose of securing payments due.

(b) That Orland Fiandaca, President of 1st Ok Corporation informed the Defendants that they should not go to an attorney, that attorneys were expensive and the Defendants would be properly secured by the contract which was drafted in accordance with his instruction and further that he would take the Defendants to Utah Title and Abstract Company, specialists in real property matters

who would make certain that the Defendants were adequately secured and would suffer no financial injury or damage. Upon the inducement so made, these Defendants did execute the Trust Agreement attached to Plaintiff's Complaint marked Exhibit "B" and did convey their property to Defendant, Utah Title and Abstract Company; that Utah Title and Abstract Company did not undertake to represent these Defendants or to secure them from economic or financial loss; that in fact they only administered the Uniform Real Estate Contract already prepared by the Plaintiff which agreement permits a substantial reduction in the value of Plaintiff's security because property can be selected at random by Plaintiff and sold to third parties and the limited proceeds required to be paid for partial releases are applied on accruing payments due under the contract; therefore, Plaintiff selects valuable parcels of land and has said parcels conveyed to said third parties and do thereby substantially decrease Plaintiff's security interest.

(c) *Orland Fiandaca, President of Plaintiff Corporation did represent to these Defendants that he was an expert in developing commercial property and that he would effectively negotiate with the State of Utah and all other interested persons to make certain that adjoining property retained by these Defendants would be substantially increased in value; that he would see that the State of Utah granted suitable access rights to a proposed interstate highway so that Defendants' adjoining properties could be developed for commercial purposes.*

That Plaintiff has not represented these Defendants in said negotiations in any manner or attempted to secure access rights or attempted to assist these Defendants in planning their property for commercial development.

(d) *That Plaintiff through its President did further represent that it would reserve adequate easements and access rights to and from the interstate highway for the benefit of Defendants' adjacent property.*

That no attempt has been made to reserve easements and rights-of-way for Defendants' benefit.

(e) *Orland Fiandaca, President of Plaintiff corporation did further represent to the Defendants that he would reserve for their benefit all gas, oil and mineral rights.*

That in fact, the Plaintiff did cause the Defendants to convey all of their gas, oil and mineral rights to the trustee and it further executed instruments conveying gas, oil and mineral rights to third parties who have purchased parcels of property from the Plaintiff by reason of the lot release provisions contained in Exhibit "A".

Each of the foregoing allegations demonstrate that Orland Fiandaca did hold himself out to be an expert in drafting legal documents, planning and managing freeway properties and in dealing with real estate; that Defendants Curtis did rely upon him completely to draft a legal instrument and make such arrangements as would accomplish their purposes of security, property management and for development of their property and sale to third parties.

The Plaintiff was instructed by the Court to prepare a pre-trial order (TR3). He did not finalize the order. Therefore, the Defendants Curtis submitted a pre-trial order (R45 through 47) prior to the trial in which the issues submitted to the jury were specifically set out as follows:

"5. The following are the issues of fact to be tried:

(a) Did Plaintiff's President, Orland Fiandaca, induce Defendants Morris H. Curtis and Sadie P. Curtis into entering into the agreement to sell their property by false representations, and if so, what were those false representations?

(b) Did Fiandaca and his corporation or either of them hold themselves out as being capable of performing and willing to perform and, in fact, undertake and agree to furnish professional and expert services and advice in evaluating, classifying, zoning, obtaining accesses for, marketing, determining the accurate amount of acreage of, offering for sale and selling real property for commercial development and whether or not Curtises in reliance upon that representation and in reliance upon Fiandaca or his corporation holding themselves out as willing and able to perform those services relied thereupon in execution of the several contracts and Fiandaca and his corporation, having undertaken to do those things and furnish that advice and services failed to do so and thereby damaged Curtises.

(c) Did a confidential relationship exist between Orland Fiandaca, President of 1st Ok Corporation and Morris H. Curtis and Sadie P. Curtis?

(d) When was the payment due from Plaintiff on January 5, 1974, made to Defendants, Morris H. Curtis and Sadie P. Curtis or their agent? . . .

6. The following are issues of law to be decided by the court:

(a) Have Defendants Morris H. Curtis and Sadie P. Curtis waived any deficiencies in the time and manner of payment of the payment due from Plaintiff on January 5, 1974?

(b) Does Plaintiff have an adequate remedy at law, and is it entitled to specific performance?

(c) Are Defendants Morris H. Curtis and Sadie P. Curtis entitled to have their contract with Plaintiff rescinded because of the fraudulent inducement of Plaintiff?

(d) Did a confidential relationship exist between Orland Fiandaca, President of 1st Ok corporation and Morris H. Curtis and Sadie P.

Curtis and are the Curtises entitled to have their contract with Plaintiff rescinded because of a breach of fiduciary trust by the Plaintiff?

(e) Are Defendants Morris H. Curtis and Sadie P. Curtis entitled to forfeit the interest of Plaintiff in the real property being purchased, or would such forfeiture be unconscionable?

7. Issues of fact will be submitted to the jury by special interrogatories and general verdict form. Counsel for Plaintiff and Defendants Curtis will submit their proposed special interrogatories to the Court before 10:00 A.M. on the morning of trial."

The pre-trial order, instructions, special jury interrogatories and general jury verdict forms were all submitted to the court and to counsel for the Plaintiff prior to 10:00 A.M. on the morning of the commencement of trial. Each of the instruments detailed the Defendants' theory of the case. Plaintiff did not request a continuance and did elect to proceed to trial.

2. THE EVIDENCE INTRODUCED DURING TRIAL REQUIRED THE INSTRUCTIONS TO BE GIVEN.

We respectfully submit that the relationship between the parties was set out by the facts pleaded in the Defendants Curtis Counterclaim and also specifically set out in the pre-trial order and the request for instructions and in the special jury interrogatories and general jury verdict forms submitted prior to trial. However, we are of the opinion that even if the pleadings

had not covered the specific relationship of the parties the facts in evidence at trial did in fact prove a confidential relationship. Under this circumstance, the Court was required to submit instructions to advise the jury on the burden of proof on the issue of fraud.

This Court covered this question in considerable detail in the case of *In Re Swan's Estate*, 4 Utah 2d 277, 293 P. 2d 682:

"Where a confidential adviser is made the beneficiary in a will, receives gifts or possible benefits from transactions with the person who relies on his advice and counsel on such matter in the making or execution of which he actively participates, a presumption of fraud and undue influence arises, which shifts the burden of persuading the trier of fact that there was no fraud or undue influence."

This Court also stated:

"For reasons previously pointed out we also reject the doctrine that this presumption is eliminated by a prima facie showing to the contrary. After careful study and consideration we conclude that this presumption shifts the burden onto the confidential adviser of persuading or convincing the fact finder by a preponderance of the evidence that no fraud or undue influence was exerted, or in other words, he had the burden of convincing the fact finder from the evidence that it is more probable that he acted perfectly fair with his confidant; that he made complete disclosure of all material information available and took no unfair advantage of his superior position."

In *Johnson vs. Johnson*, 9 Utah 2d 40, 337 P.2d 420 the Court stated:

"In assaying the sufficiency of proof, the plaintiffs here have significant help in the rule that when a confidential relationship is shown to exist and a gift or conveyance is made to a party in a superior position, a presumption arises that the transaction was unfair.¹ This presumption has the force of evidence and will itself support a finding if not overcome by countervailing evidence. Therefore, the burden was upon the defendant Calvin Johnson to convince the court by a preponderance of the evidence that the transaction was fair.² If he failed to do so, the finding to the contrary was justified, and it will not be disturbed on appeal unless the contrary evidence was so clear and persuasive that all reasonable minds would so find.

There can be no doubt that the existence of a confidential relationship here of the very kind for which the above rule was fashioned. The evidence shows that his father reposed great confidence in Calvin. This is epitomized by his cooperating with him in making final arrangements about his property for the eventuality of death."

In the case of *Omega Investment Co. vs. Woolley*, 72 U. 474, 271 P. 797, this Court said:

"The confidential relation being shown to exist, the burden devolved upon Woolley to show that, in the making of the transaction, the fullest and fairest explanation and communication was made to Baldwin of every particular in Woolley's breast; that

¹*Omega Investment Co. vs. Woolley*, 72 Utah 474, 271 P. 797, quoting 2 Pomeroy, Equity Jurisprudence, Sec. 956.

²*In Re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682.

the transaction itself was fair, and the consideration paid therefor adequate, before a court is justified in permitting the transaction to stand."

The facts proved at the time of trial required the Court to submit to the jury the issue of whether or not there was a confidential relationship. In the event the jury found a confidential relationship did exist, the Court was further required to instruct specifically concerning the burden of proof required to be assumed by the respective parties.

POINT II

DEFENDANTS CURTIS DID ALLEGE AND DID PROVE THE ELEMENTS OF ACTIONABLE FRAUD.

Defendants Curtis did allege the essential elements of actual fraud as specifically set forth in the Utah Case of *Pace vs. Parrish*, 122 U. 141, 247 P.2d 273. The allegations are contained in Defendants Counterclaim and in an amendment authorized by the Court and included in the pre-trial order. The Plaintiff acknowledges the additional specific claim of the Defendants Curtis which is in paragraph 2 of the pre-trial order (R.45):

"2. The Counterclaim of Defendants Morris H. Curtis and Sadie P. Curtis is hereby amended to show the date of execution of the instruments described therein as January 3, 1973 and further amended to show that Defendants allege Plaintiff represented the property described in the contract of January 21, 1972 included 70 acres of Curtis land which representation was false since the property described consisted of approximately 90 acres."

The appellant made certain the jury fully understood the burden of proof upon Defendants Curtis in connection with their allegation of common law fraud. In addition to having the Court instruct specifically thereon in Instruction No. 17 (R.79), the Plaintiff did have the Court submit the following Special Interrogatory No. 5 (R.86) which was Plaintiff's requested Instruction No. 1:

"We the jury, find from a preponderance of the evidence in this case the following answers to the questions propounded to us:

(a) Prior to entering into the Uniform Real Estate Contract whereby Plaintiff purchased real property from Defendants Morris H. Curtis and Sadie P. Curtis, did Orland Fiandaca, President of Plaintiff corporation, make any representations concerning then presently existing material facts?

ANSWER: YES

If the answer to the previous question is yes, answer questions B through F.

(b) Were said representations false:

ANSWER: YES

(c) Did Orland Fiandaca, at the time of such representations, know them to be false or make them recklessly, knowing that he had insufficient knowledge upon which to base such representations?

ANSWER: YES

(d) Were such representations made for the purpose of inducing Morris H. Curtis and Sadie P. Curtis to act upon them?

ANSWER: YES

(e) Did Defendants Morris H. Curtis and Sadie P. Curtis, acting reasonably, and in ignorance of the falsity of such representations, in fact rely upon them?

ANSWER: YES

(f) Were Defendants Morris H. Curtis and Sadie P. Curtis thereby induced to act to their injury or damage?

ANSWER: YES

Setting aside the consideration of the existing confidential relationship and other acts of fraud, the jury found a specific fraudulent representation by Fiandaca which would be controlling.

The first option agreement prepared by Fiandaca was torn up and rescinded by the parties on January 21, 1972 (TR346). A second option (Ex.41) was prepared by Fiandaca in his own hand on the same day (TR346). He secured the signatures of the Curtises by representing the real property description contained 70 acres and the price was set on that basis. The description did in fact contain 90 acres.

The jury considered the matter under Interrogatory No. 4 (R.85):

"INTERROGATORY NO. 4: Do you find from the evidence that on or before January 21, 1972 Mr. Fiandaca sought and obtained an amendment to the previous agreement between the parties by which amendment he obtained or would have obtained rights in an additional 40 acres of land owned by Mr. and Mrs. Curtis while failing to disclose that fact or while representing

to Defendants or allowing them to believe Mr. Fiandaca was obtaining rights in only an additional 20 acres of land?"

The jury answered "yes".

CONCLUSION

We submit the trial court did not error in instructing the jury concerning common law fraud or instructing the jury separately concerning a confidential relationship.

The jury correctly found that common law fraud was practiced upon the Curtises and did further correctly find that a confidential relationship existed between Orland Fiandaca, President of the 1st Ok Corporation, and the Defendants Curtis and that Fiandaca breeched the confidence imposed in him under that relationship.

We respectfully submit the general verdict and special interrogatories of the jury and the findings of fact, conclusions of law and judgment of the court should be affirmed.

Respectfully submitted,

TEX R. OLSEN
Olsen and Chamberlain
76 South Main
Richfield, Utah 84701

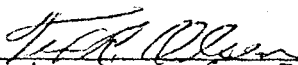
Attorneys for Defendants-Respondents

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of February,
A. D., 1976, two copies of the within and foregoing
Brief of Respondents, Morris H. Curtis and Sadie P.
Curtis, were served upon the following by U. S. Mail,
postage prepaid:

Mr. John H. Allen
Callister, Greene & Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133

Mr. Richard A. Rappaport
Cohne, Rappaport & Segal
Suite 920 Boston Building
Salt Lake City, Utah 84111



Attorney for Respondents
Morris H. Curtis and Sadie
P. Curtis

**RECEIVED
LAW LIBRARY**

SEP 16 1976

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**